IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 919 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment?	NO
2	To be referred to the Reporter or not?	NO
3	Whether Their Lordships wish to see the fair copy of the judgment?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?	NO
5	Whether it is to be circulated to the Civil Judge?	NO

==========

MUSTAQALI ABBASALI SAIYED - Appellant
Versus
STATE OF GUJARAT - Opponent

==========

Appearance :
MR AD SHAH for the Appellant.
MS HANSA PUNANI ADDITIONAL PUBLIC PROSECUTOR for the Opponent.

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 31/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. With the consent of the learned Advocates for the parties, this appeal is heard finally and disposed of at the admission stage.

2. The present appeal is preferred under Section 34 of the Prevention of Terrorism Act, 2002 (**"POTA"**, for short) and directed against the order of rejection of discharge application dated 20-06-2007 passed by the learned Special Judge (POTA) under Section 227 of the Code of Criminal Procedure, 1973 (**"Cr. P. C."**, for short).

The appellant was arrested on 22nd / 23rd November 2004 by DCB Police Station in CR No. I-6 of 2003 for the offences punishable under Sections 120B, 121, 122 and 123 of the Indian Penal Code, 1860 (**"IPC"**, for short); Sections 25(1)(AA), 27 and 29 of the Arms Act; and Sections 3 (1) (AB), 3 (3), 4, 20, 21(2)B and 22 (3) (AB) of POTA.

The first charge-sheet in respect of the said offences was filed in the Court of learned Special

Judge (POTA) on 10-09-2003 against 39 accused whereas 43 accused were shown in Column No. 2 as absconding accused. The second charge-sheet was submitted on 21-01-2004 against 8 accused and 45 accused were shown as absconding accused. The third charge-sheet was submitted on 27-01-2005 against 1 accused and 44 accused were shown as absconding accused in Column No. 2. The fourth charge-sheet was submitted on 19-02-2005 against 4 accused and 44 accused were shown as absconding accused in Column No. 2. The fourth charge-sheet relates to the present appellant and three other accused, namely, Harpalsinh N. Zala (accused No. 1), M. G. Shaikh (accused No. 3) and Javed Khan (accused No. 4).

The charge-sheets, which were filed, were in respect of the alleged conspiracy hatched during April 2002 to 3rd April, 2003. The object of the criminal conspiracy, as per the prosecution case, was to spread fear and terror with a view to take revenge over the loss of life and property caused to the Muslim community in the State of Gujarat in the aftermath of Godhra massacre. The object of conspiracy was to create communal hatred between the Hindus and the

Muslims, to incite the Muslim youth to take up terrorist training in Pakistan, to organize the training with the help of ISI of Pakistan and terrorist organizations like *Lashkar-e-Toiba*, to collect money and weapons for the terrorist activities, to cause bomb-blasts, etc.

It is alleged in the charge-sheet that the accused had helped Sharif Khan, a terrorist, in disposing of his property and involved in sending the sale proceeds to Sharif Khan in Pakistan for the purpose of using the same for terrorist activities. Thus, the allegation against the accused was that he had abetted the terrorist activities by joining with other three accused in criminal conspiracy. The Central Review Committee on POTA, in respect of CR No. I – 6 of 2003, considered the case of the four accused and came to the conclusion that the transaction in respect of the property i.e. Green Bungalow at Ahmedabad was purchased by Sharif Khan, a notorious criminal, from the original owners in the year 1991. However, there was no evidence that the Green Bungalow was purchased from the proceeds of terrorism. Even though he had purchased the property in the year 1991,

there was no attempt to seize the property under the provisions of TADA Act. The accused – Sharif Khan was declared absconder and no steps were taken for attaching the said property. Thus, the evidence collected by the prosecution in respect of fourth charge-sheet submitted on 19-02-2005 nowhere establishes any connectivity with the object of conspiracy in respect of CR No. I – 6 of 2003. Though there was no connectivity, the Investigating Officer of the DCB started further investigation on or about 3rd November, 2004. Even the earlier three charge-sheets submitted on 10-09-2003, 21-01-2004 and 27-01-2004 nowhere reflected any connection with the property of the Green Bungalow. However, for the first time on 23rd November, 2004, the prosecution came forward with the involvement of the fourth accused in the fourth charge-sheet in CR No. I – 7 of 2003. The participation of the accused in the act of conspiracy has not even remotely been established by the prosecution. However, out of the four accused, the Review Committee observed, in respect of three accused, namely, Harpalsinh Natvarsinh Zala – accused No. 49, MohmmadAli Gulamnabi Shaikh – accused No. 41 and Javed Khan – accused No. 52, that even their

detention under all the provisions of POTA was not justified.

Involvement of the accused is mainly based on the so-called confessional statement purported to have been recorded on 28-11-2004 by the Deputy Police Commissioner, Zone-III, Ahmedabad City. In pursuance of the provisions contained in Section 32 of the POTA, after recording the statement on 28-11-2004, the appellant was produced before the Court of learned Chief Metropolitan Magistrate, Ahmedabad on 29-11-2004 at 10.45 AM. A bare perusal of the confessional statement makes it quite clear that the statement recorded was not free from doubt and that it was recorded in the most mechanical manner and in flagrant violation of Section 32 (5) of the POTA. Even when the appellant was produced before the learned Special Judge (POTA) on the completion of remand, he retracted confessional statement purported to have been recorded by the concerned officer. Thus, the reference made by the learned Judge to the confessional statement of the appellant-accused for determining the *prima facie* case for framing of the charge it totally unjustified.

3. Mr. A. D. Shah, learned Advocate appearing for the appellant, further submitted that, as per the prosecution case, the appellant was possessing fire-arms with two pistols which were seized on 23-11-2004. The recovery was disputed by the appellant. However, the learned Advocate submitted that there is nothing on record to show that the appellant ever used this particular weapon for the purpose of any terrorist activity. POTA was repealed on 21-09-2004. In the facts and circumstances, the learned Advocate submitted that the day on which the arms came to be recovered, POTA was not in existence, and there was no evidence collected by the investigating agency as to the use of the weapon by the appellant in any terrorist activity prior to 21-09-2004. Thus, the provisions contained in Section 3(3) of POTA cannot be invoked for the alleged recovery of the arms from the appellant. The learned Advocate submitted that even the FSL Report makes it abundantly clear that the pistols which were recovered were not standard and semi-automatic. In view of the aforesaid facts and circumstances, the recovery of the arms would not attract the provisions of POTA. There was no evidence to show that the recovery of arms had any connection

with any of the accused. The learned Advocate submitted that the appellant has thus, made out a case for discharge for the offences alleged to have been committed under the provisions of POTA. In the alternative, the learned Advocate has also prayed to stay the proceedings of POTA Case No. 2 of 2005 during the pendency of appeal.

4. The learned Advocate has placed reliance on the following judgments in support of the submissions canvassed at the Bar:

(i) Kartar Singh Vs. State of Punjab, 1994 Criminal Law Journal 3139.

(ii) State (NCT of Delhi) Vs. Navjot Sandhu with other appeals, AIR 2005 SC 3820.

(iii) State of Maharashtra Vs. Siraj Ahmed Nisar Ahmed And Others, AIR 2007 SC 1859.

(iv) Central Bureau of Investigation Vs. V. C. Shukla and Others, AIR 1998 SC 1406.

(v) Suraj Singh And Another Vs. State of Haryana, (1998) 7 SCC 337.

(vi) Dhananjaya Reddy Vs. State of Karnataka with other appeals, AIR 2001 SC 1512.

The first judgment cited by the learned Advocate is with regard to the provisions contained in Terrorist and Disruptive (Prevention) Act where the validity of Section 3 of the said Act was challenged. The Hon'ble Apex Court laid down the guidelines in respect of recording of confessional statement under Section 15 of the said Act.

The second judgment cited by the learned Advocate is the case wherein the Hon'ble Apex Court considered the provisions of Section 32 of POTA and the confessions made by the accused, and after considering the same, the Hon'ble Apex Court held that safeguard built in Section 32 (4) and 32 (5) requires to be complied with. If there is any breach of the safeguards contained in the said sub-sections, it would have a vital bearing on the admissibility and evidentiary value of the confessions recorded under

sub-section (1) of Section 32.

The third judgment is cited by the learned Advocate in support of the submission that the confession made by the accused under Section 32 of POTA would require strict compliance of sub-sections (4) and (5) of Section 32. The case before the Hon'ble Supreme Court was in respect of the provisions contained in Section 15 of POTA. The Hon'ble Apex Court held that if the confession of the accused is recorded in a mechanical manner and when there is non-compliance of sub-rule of (3)(b) of Rule 15 of the POTA Rules, the confessional statement would get vitiated. The same analogy, as per the submission of the learned Advocate, would apply to the confessional statement of accused under Section 32 of POTA.

The fourth judgment is cited by the learned Advocate in support of the submission that when a case of criminal conspiracy is alleged against the accused, then prosecution has to prove the conspiracy hatched by the accused. Even if an abetment is alleged, then *prima facie* abetment of the accused is required to be established by the prosecution.

The fifth judgment is cited by the learned Advocate in support of the submission that at the time of framing of the charge, the confession made by the accused, who has been discharged, is not admissible against the co-accused and the Court is not justified in taking into consideration such confession for framing the charge against the co-accused on the ground that the prosecution could examine him as a witness for establishing the facts disclosed in his confession.

The sixth judgment is cited by the learned Advocate in support of the submission that the safeguards which are provided under Sections 32 (4) and (5) are required to be complied with. In the case before the Hon'ble Supreme Court, the confessional statement under Section 164 (4) of the Code of Criminal Procedure came up for consideration. The Hon'ble Apex Court held that the words used in sub-section (4) of Section 164 “shall be signed by the person making the confession” are of mandatory nature. Omission to get the signature of the person making the confessional statement is vital. The same analogy

would apply to the confessional statement made by the accused under Section 32 of POTA.

Thus, the learned Advocate submitted that taking into consideration the ratio laid down in the above mentioned judgments, the appellant is required to be discharged, as prayed for in the appeal.

5. Ms. Hansa Punani, learned Additional Public Prosecutor, representing the State submitted that the order passed by the learned Special Judge rejecting the application for discharge preferred by the appellant under Section 227 of the Code of Criminal Procedure is just and proper, as the learned Judge has indicated *prima facie* nature of the involvement of the appellant in the commission of crime. It is also held by the learned Judge that recovery *panchnama prima facie* mentions the recovery of the fire-arms which were sophisticated in nature and it had connectivity with the POTA Case bearing No. 12 of 2003. The recovery of arms, as per the submission of the learned Additional Public Prosecutor, was made in the notified area and, therefore, considering the *prima facie* material which was available against the appellant and

the nature of his involvement as well as the connectivity in the POTA Case No. 12 of 2003, the learned Judge has rightly rejected the application preferred by the appellant for his discharge. The learned Additional Public Prosecutor further submitted that even the confessional statement recorded under Section 32 of POTA cannot be discarded completely. It can be looked into by the Court for the purpose of corroboration. Thus, taking into account the *prima facie* evidence available against the appellant, the appellant was not discharged under Section 227 of the Code of Criminal Procedure, as prayed for in the application.

6. The learned Advocate has placed reliance on the following judgments in support of the contentions raised at the Bar:

(i) Superintendent & Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja & Others; AIR 1980 SC 52.

(ii) State (NCT of Delhi) Vs. Navjot Sandhu with other appeals, AIR 2005 SC 3820 : (2005) 11

SCC 600.

(iii) Abdulvahab Abdulmajid Shaikh And Ohters Vs. State of Gujarat and other appeals; (2007) 4 SCC 257.

The first judgment is cited by the learned Additional Public Prosecutor in support of the submission that at the time of framing of the charge, the prosecution evidence does not commence. The Court has to consider the question as to framing of the charge on a general consideration of the material placed before it by the Investigating Officer. The standard test, proof and judgment, which has to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing of the charge. Even at the stage of framing of the charge, a very strong suspicion founded upon the materials placed before the Court, which leads the Court to form a presumptive opinion as to the existence of factual ingredients constituting the offence alleged, would also justify the framing of the charge against the accused.

The second judgment is cited by the learned Additional Public Prosecutor in support of the submission that confessional statement of the accused can be relied upon for the purpose of corroboration under Section 32 of POTA.

The third judgment is cited by the learned Additional Public Prosecutor in support of the submission that if confessional statement given by the accused is of a voluntary nature, then the retraction made at a later stage does not mean that the confession was not voluntary in nature and, therefore, even if retraction is made at a later stage, then the confession given by the accused cannot be said to be involuntary. Thus, the learned Additional Public Prosecutor submitted that taking into consideration the reasons assigned by the learned Special Judge POTA in the order rejecting the application for discharge, the present appeal does not call for any interference and the same requires to be dismissed.

7. This Court has heard Mr. A. D. Shah, learned Advocate for the appellant and Ms. Hansa Punani, learned Additional Public Prosecutor for the State, at

length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire material placed on record of the case. We have also carefully considered the judgments cited by the learned Advocate representing the appellant as well as the learned Additional Public Prosecutor for the State. There is no dispute about the ratio or proposition laid down in those judgments.

8. The learned Advocate for the appellant contended that the order rejecting the application for discharge preferred under Section 227 of the Cr. P. C. mainly on the ground that the confessional statement recorded is not in compliance with the provisions contained in Section 32 (4) and 32 (5) of the Act and the safeguards which are enumerated therein are not strictly complied with and the confessional statement requires to be discarded. On perusal of the confessional statement as well as the provisions contained in Section 32 (4) and 32 (5) of TADA, we are of the considered view that the confessional statement recorded under Section 32 of POTA is a substantive piece of evidence and for the purpose of

corroboration, it can be used against the accused. In view of the aforesaid facts and circumstances, the contention raised by the learned Advocate is without any substance and it deserves to be rejected. It is further contended by the learned Advocate on behalf of the appellant that two pistols were seized from the appellant on 23-11-2004 and POTA was repealed on 21-09-2004. In view of the aforesaid facts and circumstances, when the arms were recovered from the possession of the appellant, POTA was not in existence and even there was no evidence collected by the Investigating Agency to use the weapon in a terrorist activity by the appellant prior to 21-09-2004. On perusal of the material placed before us and the reasoning given by the learned Judge, it is clear that the recovery panchnama showing possession of fire-arms of a sophisticated nature was prepared and it had *prima facie* connectivity with the POTA case of the appellant with that of POTA Case bearing No. 12 of 2003. The argument canvassed by the learned Advocate was considered by the learned Judge and we do not see any reason to interfere with the reasoning given by the learned Judge. In view of the above facts, when the recovery of the arms was made in a notified area,

then the provisions of sub-section (3) of Section 3 *prima facie* can be attracted and, therefore, even in the second submission canvassed by the learned Advocate for the appellant, we do not find any merit and the same is liable to be rejected and it is hereby rejected. It is also contended by the learned Advocate for the appellant that the POTA Review Committee held that there was no justification to proceed against Harpalsinh Natvarsinh Zala – accused No. 49, MohmmadAli Gulamnabi Shaikh – accused No. 41 and Javed Khan – accused No. 52 – under the provisions of POTA and as the three accused were given clean chit by the Review Committee, the involvement of the present appellant raises doubt and the applicability of the POTA could not be justified against the appellant. The decision of the POTA Review Committee is pending before the Hon'ble Apex Court. Therefore, the said decision, in our view, cannot be said to be final. However, taking into account the *prima facie* involvement and the material available against the appellant, he, in our considered view, cannot be discharged. We have also considered the provisions of Section 227 of Cr. P. C. and it is reproduced hereinbelow:

> "**227. Discharge.-** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

In view of the provisions contained in Section 227 of the Cr. P. C., if the *prima facie* involvement of the accused is not established or if the Judge considers that the same is not sufficient ground for proceeding against the accused, then he can be discharged. Taking into account the material which was placed before us, we are of the considered view that when the application was preferred by the appellant under Section 227 of the Cr. P. C., the Court has rightly considered the *prima facie* involvement of the appellant in the commission of offence and when it was found by the learned Judge that there was sufficient material to frame charge against the appellant, the application for discharge was rejected. We do not see any reason to interfere with the order passed by the learned Judge. In view of the foregoing discussion, the present appeal does

not call for any interference. Hence, we pass the following order:

ORDER

The appeal is dismissed.

[ANIL R. DAVE, J.]

[H. B. ANTANI, J.]

/shamnath